

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2
3 WILLIAM A. MUNDELL
Chairman

4 JIM IRVIN
Commissioner

5 MARC SPITZER
Commissioner
6

7 IN THE MATTER OF THE RULES TO ADDRESS
8 SLAMMING AND OTHER DECEPTIVE
PRACTICES

DOCKET NO. RT-00000J-99-0034

9 **STAFF'S SUPPLEMENTAL**
10 **COMMENTS**

11
12 Pursuant to the July 9, 2002 Procedural Order in this matter, Staff hereby files its proposed
13 revisions to A.A.C. R14-2-1914, R14-2-2012, and R14-2-2005. The Procedural Order also directed
14 Staff to explain whether the changes are substantive. As set forth more fully below, the changes are
15 substantive, but are not substantial, and are thus allowable. Staff respectfully requests that these
16 proposed revisions be included in the Recommended Opinion and Order in this matter.

17 **R14-2-1914. Script Submission**

- 18 A. Each Telecommunications Company shall file under seal in a docket designated by the
19 Director of the Utilities Division ("DIRECTOR") a copy of all SALES OR MARKETING
20 scripts used by its (or its agent's) sales or customer service workers. FOR THE PURPOSES
21 OF THIS RULE, "SALES OR MARKETING SCRIPTS" MEANS ALL SCRIPTS THAT
INVOLVE PROPOSING A CHANGE IN TELECOMMUNICATIONS COMPANY OR
RESPONDING TO AN INQUIRY REGARDING A POSSIBLE CHANGE IN
TELECOMMUNICATIONS COMPANY.
- 22 B. A TELECOMMUNICATIONS COMPANY SHALL MAKE THE FILING DESCRIBED IN
R14-2-1914.A AT THE FOLLOWING TIMES:
- 23 1. 90 DAYS FROM THE DAY THESE RULES ARE FIRST PUBLISHED IN A
24 NOTICE OF FINAL RULEMAKING IN THE ARIZONA
ADMINISTRATIVE REGISTER;
 - 25 2. ON APRIL 15 OF EACH YEAR;
 - 26 3. WHENEVER DIRECTED TO DO SO BY THE DIRECTOR; AND
 - 27 4. WHENEVER A MATERIAL CHANGE TO A SCRIPT OCCURS OR A
NEW SCRIPT IS USED THAT IS MATERIALLY DIFFERENT FROM A
SCRIPT ON FILE WITH THE DIRECTOR.
- 28

- 1 C. The Director ~~of the Utilities Division~~ may request further information or clarification on any
2 script, and the Telecommunications Company shall respond to the Director's request within
3 10 days.
- 4 D. The Director ~~of the Utilities Division~~ may initiate a formal complaint under R14-3-101
5 through R14-3-113 to review any script. The failure to file such a complaint or request
6 further information or clarification does not constitute approval of the script, and the fact that
7 the script is on file with the Commission may not be used as evidence that the script is just,
8 reasonable, or not fraudulent.

9 **R14-2-2012 Script Submission**

- 10 A. Each Telecommunications Company shall file under seal in a docket designated by the Director
11 of the Utilities Division ("DIRECTOR") a copy of all SALES OR MARKETING scripts used by
12 its (or its agent's) sales or customer service workers. FOR THE PURPOSES OF THIS RULE,
13 "SALES OR MARKETING SCRIPTS" MEANS ALL SCRIPTS THAT INVOLVE AN OFFER
14 TO SELL A PRODUCT OR SERVICE OR A RESPONSE TO A REQUEST FOR A PRODUCT
15 OR SERVICE, INCLUDING ALL SCRIPTS FOR UNRELATED MATTERS THAT INCLUDE
16 A PROMPT FOR THE SALES OR CUSTOMER SERVICE WORKERS TO OFFER TO SELL
17 A PRODUCT OR SERVICE.
- 18 B. A TELECOMMUNICATIONS COMPANY SHALL MAKE THE FILING DESCRIBED IN
19 R14-2-2012.A AT THE FOLLOWING TIMES:
- 20 1. 90 DAYS FROM THE DAY THESE RULES ARE FIRST PUBLISHED IN A
21 NOTICE OF FINAL RULEMAKING IN THE ARIZONA ADMINISTRATIVE
22 REGISTER;
 - 23 2. ON APRIL 15 OF EACH YEAR;
 - 24 3. WHENEVER DIRECTED TO DO SO BY THE DIRECTOR; AND
 - 25 4. WHENEVER A MATERIAL CHANGE TO A SCRIPT OCCURS OR A NEW
26 SCRIPT IS USED THAT IS MATERIALLY DIFFERENT FROM A SCRIPT ON
27 FILE WITH THE DIRECTOR.
- 28 C. The Director ~~of the Utilities Division~~ may request further information or clarification on any
script, and the Telecommunications Company shall respond to the Director's request within 10
days.
- D. The Director ~~of the Utilities Division~~ may initiate a formal complaint under R14-3-101 through
R14-3-113 to review any script. The failure to file such a complaint or request further
information or clarification does not constitute approval of the script, and the fact that the script is
on file with the Commission may not be used as evidence that the script is just, reasonable, or not
fraudulent.

R14-2-2005.D

During each contact ~~during~~ IN WHICH the Telecommunications Company offers to ~~sell a product or~~
~~service~~ ESTABLISH SERVICE or during which a ~~s-Subscriber~~ PERSON requests to ~~buy a product~~
~~or service~~, THE ESTABLISHMENT OF SERVICE, the Telecommunications Company shall
[remainder unchanged].

These changes are not substantial.

1 A Notice of Supplemental Proposed Rulemaking is required only when “as a result of public
2 comments or internal review, an agency determines that a proposed rule requires substantial
3 change....” A.R.S. § 41-1022(E); see also A.R.S. § 41-1025(A)(providing that “An agency may not
4 submit a rule to the council that is substantially different from the proposed rule contained in the
5 notice of proposed rulemaking....”); A.A.C. R1-1-507 (proscribing contents of notice of
6 supplemental proposed rulemaking); Arizona Rulemaking Manual 51 (2001)(restating
7 standard)(available at www.sos.state.az.us). In determining whether a change is “substantial”, an
8 agency must consider the factors listed in A.R.S. § 41-1025(B):

- 9 1. The extent to which all persons affected by the rule should have understood that the
10 published proposed rule would affect their interests.
- 11 2. The extent to which the subject matter of the rule or the issues determined by that rule
12 are different from the subject matter or issues involved in the published proposed rule.
- 13 3. The extent to which the effects of the proposed rule differ from the effects of the
14 published proposed rule if it had been made instead.

15 Applying these factors, it appears that the proposed changes are not substantial:

- 16 1. Persons affected by the rule, primarily telecommunications companies that would be
17 required to submit scripts, should have understood the published proposed rule would
18 affect their interests because the published proposed rule provided for more scripts to
19 be submitted than Staff’s proposed revision.
- 20 2. The subject matter of the rule is the same, the proposed revision simply narrows and
21 clarifies the scope of the proposed rules and describes when filings are required.
- 22 3. The effects of Staff’s proposed revision do differ to some degree from the effects of
23 the proposed rule. However, the overall effect of the rule (to require
24 telecommunications companies to submit scripts so that the Commission can monitor
25 the scripts for fraudulent or misleading language) remains the same.

26 There is no Arizona case law applying A.R.S. § 41-1025(B). Section 41-1025(B) is based on
27 § 3-107(b) of the Model State Administrative Procedure Act (1981). The Official Comment to
28 § 3-107 notes that “Subsection (b) does not eliminate all ambiguity as to the meaning of
“substantially different”, but it does create a more specific functional test relating the acceptability of
any changes in the proposed rule as compared to the adopted rule to the extent to which affected
parties have received fair notice by the proposed rule publication” (emphasis added). Since the

1 published rules were broader than Staff's proposed revisions, the published proposed rule gave fair
2 notice to any interested party that the Commission would be considering these matters.

3 In the absence of any case law interpreting §§ 41-1025(B) or 3-107(b), Arizona courts may
4 turn to federal cases applying the Federal Administrative Procedure Act. Federal cases employ the
5 "logical outgrowth" test. Alas, this test is notoriously difficult to apply. See Phillip M. Kannan, The
6 Logical Outgrowth Doctrine in Rulemaking, 48 Admin. L. Rev. 213, 216 (1996)(logical outgrowth
7 test is "ambiguous, misleading... and cannot be taken literally"); Richard J. Pierce, Jr., 1
8 Administrative Law Treatise 429 (4th ed. 2002)(test is "difficult to apply"); National Ass'n of
9 Psychiatric Health Sys. v. Shalala, 120 F.Supp.2d 33, 39 (D.D.C. 2000)(noting that it is "hard to
10 discern a clear rationale differentiating the holdings of these cases").

11 If the "logical outgrowth" test is applied, it is likely that the proposed revision passes the test.
12 A change is a logical outgrowth if "a reasonable commentor should have anticipated that such a
13 requirement would be promulgated... or whether the notice was sufficient to advise interested parties
14 that comments directed to the controverted aspect of the final rule should have been made...." First
15 American Discount Corp. v. Commodity Futures Trading Comm'n, 222 F.3d 1008, 1015 (D.C. Cir.
16 2000)(internal quotations and citations omitted.) Given the emphatic comments at the open meeting
17 when these provisions were added to the proposed rules and the broad scope of the proposed rules in
18 question, a reasonable commentor should have anticipated that the Commission would narrow the
19 scope of the rules. Indeed, a number of comments addressed exactly these issues, thus demonstrating
20 that "notice was sufficient to advise interested parties that comments directed to the controverted
21 aspect of the final rule should [be] made." Id.; see also Pierce, *Supra*, at 433 (discussing cases
22 holding that if agency adopts a proposal advanced in comments, the notice requirements are satisfied
23 because "sophisticated parties to rulemakings monitor comments submitted by other parties").

24 Because Staff's proposed revisions are not a "substantial change", the Commission may adopt
25 them in its Notice of Final Rulemaking without issuing a Notice of Supplemental Proposed
26 Rulemaking. Accordingly, Staff requests that its proposed revisions be adopted.

27 ...

28 ...

1 RESPECTFULLY SUBMITTED this 12th day of July, 2002

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10 The original and ten (10) copies of the foregoing
11 were filed this ____ day of _____, 2002
12 with:

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17 A copy of the foregoing was placed on the Commission's web site and
18 copies of the foregoing were mailed/hand-delivered
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